NO. [redacted] 42

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1947

UNITED STATES OF AMERICA, Petitioner,

vs.

[redacted], as Administrator of the Estate of
[redacted], Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE [redacted] CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNITED STATES OF AMERICA, *Petitioner*

v.

LILLIAN SPELAR, as Administratrix of the Estate of MARK SPELAR, deceased

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on December 8, 1948.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 10) is reported at 75 F. Supp. 967. The opinion of the United States Court of Appeals for the Second Circuit (R. 19) is reported at 171 F. 2d 208.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1948 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) (1948).

QUESTION PRESENTED

Whether the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country" (28 U. S. C. 2680(k) (1948)) bars, as an unauthorized suit against the United States, an action for wrongful death in accordance with the laws of Newfoundland based on the Government's allegedly negligent operations of an airbase at Harmon, Newfoundland held by the United States under lease from Great Britain.

STATUTE INVOLVED

The Federal Tort Claims Act (60 Stat. 843, 28 U. S. C. 931 (1946) *et seq.*) provided as follows, at the time this action was instituted:[1]

[1] Under the revision of the Judicial Code (Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess.), the pertinent sections of the Federal Tort Claims Act are now found in Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code. The language of Section 410(a) of the Act, formerly 28 U. S. C. 931(a), now 28 U. S. C. 1346(b), was also revised so that it now reads:

> • • • the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the Dis-

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United

trict Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Respondent's rights, however, are fixed by the law applicable at the time of the institution of her suit.

States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. * * *.

* * * * *

SEC. 421. The provisions of this title shall not apply to—

* * * * *

(k) Any claim arising in a foreign country.

* * * * *

STATEMENT

Lillian Spelar, the respondent, is the administratrix of the estate of her husband, Mark Spelar, a flight engineer employed by American Overseas Airlines, Inc. Mark Spelar was killed on October 3, 1946, when the plane in which he was riding crashed shortly after taking off from Harmon Field, an airbase in Newfoundland. This airbase is one of the areas leased by the United States from Great Britain pursuant to an Agreement and Leases entered into on March 27, 1941, after an Exchange of Notes on September 2, 1940. (See Executive Agreement Serial 235, Leased Naval and Air Bases (GPO, 1942) filed with this Court in connection with *Vermilya-Brown* v. *Connell*,

335 U. S. 377). Respondent brought this action against the United States under the Federal Tort Claims Act in the District Court of the United States for the district in which she resided, alleging that the death of her husband was due to the negligence of the Government in the operation of Harmon Field (R. 3). The complaint set forth the laws of Newfoundland which permit an action by the executor or administrator of a deceased person for death due to negligence (R. 5-6). A motion was made to dismiss the action, one of the grounds being that the court "lacks jurisdiction, as the claim herein arose in a foreign country" (R. 8). The District Court granted the motion (R. 15). On appeal, the Court of Appeals reversed (R. 18), citing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, as "persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another" (R. 20), 171 F. 2d at 209. Moreover, the opinion continues, "where the United States constructs, operates, and controls an air base so completely as is the actual fact, * * * it is on the whole fantastic to consider this territory a foreign country within the meaning of a local statute affecting the relation of this government and private persons" (R. 21), 171 F. 2d at 210.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an action based on the laws of Newfoundland and arising out of alleged negligence at an air base in Newfoundland leased by the United States was not a claim arising in a foreign country and consequently excepted from the waiver of sovereign immunity contained in the Federal Tort Claims Act.

2. In reversing the order of the district court dismissing the complaint for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

Largely in reliance upon this Court's decision in *Vermilya-Brown* v. *Connell*, 335 U. S. 377, the court below has held that a cause of action based upon foreign law arising in foreign territory under lease from Great Britain for an airbase is not excluded from the coverage of the Federal Tort Claims Act as a "claim arising in a foreign country." This Court's decision that "possessions," as used in the Fair Labor Standards Act, embraces defense base areas is taken as "well-nigh conclusive" authority on the status of such bases for purposes of general statutory construction. The mechanical application of the holding in *Vermilya-Brown* to a statute completely foreign in purpose and kind to the Fair Labor Standards Act has imposed upon the United States a large potential liability for claims based on

foreign law which Congress specifically intended to exclude from the coverage of the Act.

1. The principle enunciated by this Court in the *Vermilya-Brown* case is that the reach of a statute applicable by its terms to any "possession of the United States" does not depend "upon sovereignty in the political or any sense over the territory" but, the power existing to legislate beyond the limits of national sovereignty, on the purpose intended to be served by the statute (335 U. S. at 381.) The court's duty "is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind" (*id.* at 388). Applying this touchstone the Court found, "an intention on the part of Congress in the use of the word 'possession' to have the [Fair Labor Standards] Act apply to employer-employee relationship on foreign territory under lease for bases" (*id.* at 390).

The geographical coverage of a statute was treated by this Court as a problem of statutory construction to be resolved not by assigning any fixed or rigid meaning to the word "possession," which is not "descriptive of a recognized geographical or governmental entity," but by recourse to the legislative intent. Therefore, it by no means follows that because the Fair Labor Standards Act in the light of its purpose is to be considered as having force within the leased areas,

that the Federal Tort Claim Act should be similarly construed. Yet the court below, without making any particular note of the vital differences between the language of the two acts, and without inquiry into the legislative history of the Tort Claims Act which is conclusive on the question of the legislative intent, finds it difficult of belief "that an air base which is a possession under one Act is a foreign country, no less, under another" 171 F. 2d at 209. By considering the *Vermilya-Brown* decision to hold these bases to be "possessions" the court below finds further support for its conclusion that the Tort Claims Act applies to them as the jurisdictional section of that Act which, before its amendment, provided for exclusive jurisdiction "in the United States district courts, * * * including the United States district courts for the Territories and possessions of the United States * * *" Section 410 (a), 28 U. S. C. 931 (a) (1946). In short this Court's decision in *Vermilya-Brown* is treated as defining the content of the word "possession" as including these leased bases regardless of the context in which it is employed.

If the court below had determined the scope of the exception for claims arising in foreign countries by reference to the legislative intent rather than by mechanical reliance upon precedent it would have arrived at a result exactly contrary to that reached. "The term 'foreign country' is not a technical or artificial one and the sense in

which it is used in a statute must be determined by reference to the purpose of the particular legislation" *Borak* v. *Chicago Portrait Co.* 285 U. S. 1, 6.

2. The legislative history of the Federal Tort Claims Act permits no doubt of the legislative purpose to exclude all claims based on foreign law such as the one pressed here. The bill which eventually was passed as the Federal Tort Claims Act was first introduced during the 76th Congress. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, (1946) 35 Geo. L. J. 3. It excepted "Any claim arising in a foreign country *in behalf of an alien*" (emphasis added).[3] Among the various revisions made at the suggestion of the Department of Justice in the proposed legislation during the course of the 77th Congress, the phrase "in behalf of an alien" was deleted so as to bar all claims arising in foreign countries whether brought by an alien or a citizen. H. R. 6463, 77th Cong., 2d sess.; S. 2221, 77th Cong.,

[3] H. R. 7236, which is the first Tort Claims bill with substantially identical provisions to the present act was introduced in the 1st session of the 76th Congress, was reported favorably by the House Committee on the Judiciary (H. Rep. No. 2428, 76th Cong., 1st sess.), and passed the House (86 Cong. Rec. 12032), but after hearings the Senate Judiciary Committee did not report the companion bill, S. 2690. In the first session of the 77th Congress the bill was reintroduced as H. R. 5291 and H. R. 5373 and referred to the Committee on the Judiciary. No action, however, was taken until the second session of the 77th Congress when a revised draft was introduced (see footnote 4, *infra*).

2d sess. The enlargement of the exception was a natural corollary to the fact that the bill, as revised, in contrast to its forerunners, explicitly subjected liability to determination by the law of the place where the tort occurred. Hearings before the Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 26, 30, 35, 43, 61. Francis Shea, Assistant Attorney General in charge of the Claims Division, who explained the various changes made in the proposed Tort Claims bill to the House Committee on the Judiciary, said on this point (Hearings, *supra*, p. 35):[1]

> *Mr. Shea*: [ ] Claims arising in a foreign country have been exempted from this bill, H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> *Mr. Robsion*: You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?
>
> *Mr. Shea*: That is right. That would have to come to the Committee on Claims in the Congress.

[1] In a study prepared by the Department of Justice on the differences between H. R. 5373, the original bill as introduced in the 1st session of the 77th Congress, and H. R. 6463, the

The exception as revised to exclude all claims arising in foreign countries was contained in all subsequent drafts of the Tort Claims bill and was enacted as part of the Tort Claims Act without further discussion.* Congress clearly was unwilling to "expose the Government to claims predicated on the laws of a foreign country." *Brandl v. United States*, 77 F. Supp. 68, 72 (S. D. N. Y.); *Stranori v. United States*, 77 F. Supp. 240 (E. D. Pa.).

The legislative history of the section conferring jurisdiction of suits under the Act on the district

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revised bill introduced during the second session, incorporated in the report of the hearings held by the House Committee on the Judiciary on the two bills, and in a comparison between the two bills reproduced as Appendix IV to that report, the same explanation of the change as made by Mr. Shea is given. Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 29, 66.

*The shape of the Federal Tort Claims Act was largely determined during its consideration in the courses of the 77th Congress. Subsequently the bill was reintroduced without substantial modification or further hearings until its enactment during the 79th Congress. After hearings on the Tort Claims bill, the revised version of the bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by both the Senate and House Committees on the Judiciary (S. Rep. No. 1196, 77th Cong., 2d sess.; H. Rep. No. 2245, 77th Cong., 2d sess.), it passed the Senate, 88 Cong. Rec. 3174, but was never considered by the House. It was reintroduced in the 78th Congress (H. R. 1356, 78th Cong., 1st sess.; S. 1114, 78th Cong., 1st sess.), but no action was taken and again in the 79th Congress (H. R. 181, 79th Cong., 1st sess.). It was finally passed as part of the omnibus Legislative Reorganization Act, S. 2177, 79th Cong., 2d sess.

courts of the Territories and possessions contains further evidence of the legislative intention to restrict rather narrowly the geographical coverage of the Act. Section 110(a) 28 U. S. C. 931(a) (1946). Because this section employs the word "possessions," it was heavily relied on by the court below as supporting its construction that the Federal Tort Claims Act, like the Fair Labor Standards Act, extends to the leased bases. Unlike the Fair Labor Standards Act, however, the word "possessions" is used not to indicate the coverage of the Act, but merely as descriptive of the courts in which actions may be brought, and even for that limited purpose was intended most narrowly.

As originally drafted, the Tort Claims bill conferred jurisdiction on the "Court of Claims and the district courts." H. R. 7236 and S. 2690, 76th Cong., 1st sess. When H. R. 7236 was before the House for consideration, Mr. King inquired as to whether "district courts" embraced the District Court of Hawaii (86 Cong. Rec. 12021), and the bill was amended to include that court specifically. As part of the numerous changes made in the bill during the 77th Congress the jurisdictional section was broadened to include the "district courts for the Territories and possessions of the United States." Hearings before the Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 27, 31, 61. In this form it was passed by the 79th Congress.

In the revision of the Judicial Code, made by the 80th Congress, this language was made even more specific. In place of the blanket reference to the courts of the "Territories and possessions," the district courts outside the continental United States given jurisdiction under the Act are specifically designated. These are those for Hawaii and Puerto Rico, which are not specifically named since they are included in the term "district courts" as used throughout the Act, and those for Alaska, the Canal Zone and the Virgin Islands. 28 U. S. C. 1346(b). The change was explained by the Senate Committee on the Judiciary which made it as follows (Senate Report No. 1559, 80th Cong., 2d sess. (p. 6):

> * * * in at least one of the possessions there are local district courts which are not intended to have tort-claims jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining Territories and possessions thus makes for clarity and precision.

The Senate Committee on the Judiciary had been the responsible committee during the evolution from the 76th to 77th Congresses of the sections establishing the geographical limits of the Act. Both H. R. 7236, the earliest draft of the present act (86 Cong Rec. 12065), and S. 2221, which contained the sections as revised, and sub-

sequently enacted by the 79th Congress, were referred to it (88 Cong. Rec. 586). It reported the latter favorably (S. Rep. 1196, 77th Cong., 2d sess.). Although in the 79th Congress it was replaced by a Special Committee on the Organization of Congress, the Federal Tort Claims Act being made a part of a general reorganization act, S. 2177 (S. Rep. No. 1400, 79th Cong., 2d sess., p. 29; Hearings before the Joint Committee on the Organization of Congress pursuant to H. Con. Res. 18, 79th Cong., 1st sess.), there can be no doubt, in view of the role played by it in the 77th Congress when the bill crystallized, of its responsibility for the present language. See footnote 4, *supra*. It is therefore of great significance that it did not consider the changes made in the language of the Tort Claims Act during the revision of the Code as doing anything other than expressing the original legislative intention more clearly. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Mitchell* v. *Cohen*, 333 U. S. 411, 421; *United States* v. *Mine Workers*, 330 U. S. 258, 270-282.

That intention, as the Senate Committee saw it, had been not to include even all the recognized possessions within the broad designation of the "district courts of the Territories and possessions." An intention to exclude even such recognized possessions as the guano islands, Guam and Samoa from the "possessions" whose courts were given jurisdiction is clearly inconsistent with an

intention by the use of that word to embrace areas held only under lease.

3. Even were the congressional intent less clearly defined than it is by the legislative history, it would be unlikely that Congress intended to subject the United States to the law of the scores of jurisdictions in which the Government might find itself by permitting suit to be brought wherever local law established liability. By holding the Fair Labor Standards Act to be applicable to the leased bases, this Court extended to these areas the benefits of our national policy regarding conditions of employment; application of the Federal Tort Claims Act to the same areas would have the exactly contrary effect of subjecting the United States to the policies of other nations concerning tort liability.

The exclusion of claims arising in foreign countries from the jurisdiction given the district courts of suits against the United States was intended to bar all claims based on foreign law. Respondent's complaint, which explicitly relies on the laws of Newfoundland [5] as establishing the cause

[5] There can be no question of the applicability of the laws of Newfoundland to the Harmon Base. Specific provision is made in the leasehold terms to secure limited exemptions for the base personnel from certain aspects of that law, as for example the tax (Article XVII), immigration (Article XIII) and customs (Article XIV) laws. Other provisions similarly evidence the acceptance by both contracting parties of the dominion of the territorial laws over the leased areas such as

of action was properly dismissed by the district court as outside its jurisdiction. *Brandt* v. *United States*, 77 F. Supp. 68 (S. D. N. Y.) (Sarpani); *Strauch* v. *United States*, 77 F. Supp. 240 (E. D. Pa.) (Ghent, Belgium); *Brewer* v. *United States*, 79 F. Supp. 405 (N. D. Cal.) (Okinawa); *Leibardt* v. *United States*, decided June 22, 1948 (S. D. Cal.) (occupied zone of Germany); *Donahey* v. *Ishbrandtsen Co.*, 80 F. Supp. 180 (S. D. N. Y.) (Japan). See also *Reid* v. *United States*, 211 U. S. 529, 539; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353; *Minnesota* v. *United States*, 305 U. S. 382, 388.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

March 1949

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that securing a right of audience for United States counsel in the territorial courts whenever a member of the United States forces is made a party to a legal proceeding because of his official acts (Article VII), that providing for service of local process (Article VI), and that waiving the motor vehicle tax on vehicles belonging to the United States (Article XII). Executive Agreement Series 235, Leased Naval and Air Bases (GPO, 1942).